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Missouri's Sexually Violent Predator Law: Treatment or Punishment?

Laura Barnickol*

I. INTRODUCTION

In April of 1987, Kevin Haenchen was arrested for molesting more than nineteen children.¹ Although Haenchen was only nineteen years old, he had been molesting small children for more than three years.² After his arrest, Haenchen pleaded guilty to one count of sodomy and two counts of sexual abuse.³ He spent the next eighteen months in prison before he was released on probation.⁴ As part of his probation, the state required Haenchen to receive outpatient sex offender treatment from a St. Louis mental health clinic.⁵ During his probation, Haenchen molested a two year-old girl he was baby-sitting.⁶ As a result, the court revoked Haenchen's probation and resentenced him to ten years in prison.⁷ Since his second conviction, Haenchen has admitted to molesting twenty-eight children, many of whom attended a camp and a day care center where Haenchen volunteered.⁸

At thirty-one years old, Haenchen stated that his desire to molest children worsened during his last nine years in prison.⁹ In frustration, he stated: "Look at all the money the prison wasted on me, when I was there 10 years . . . [a]nd I'm not any better."¹⁰ Haenchen claimed

* J.D., Washington University School of Law, 2000.

1. William C. Lhotka, *Evaluation Will Decide if Molester is a Threat*, ST. LOUIS POST-DISPATCH, Apr. 23, 1999, at C2.

2. *Id.*

3. *Id.*

4. *Id.*

5. Lhotka, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. Lhotka, *supra* note 1.

10. Kim Bell, *Center to Treat Sexual Predators Starts with 1 Committed, 10 Awaiting*

that because he hated the sex offender treatment offered in prison he was unwilling to participate.¹¹ His psychologists estimated that there was a 75% probability that Haenchen would re-offend upon release.¹² In fact, Haenchen threatened to continue molesting once released from prison; he even threatened to kill his victims in order to humiliate state officials.¹³ Just prior to his commitment under the new Sexually Violent Predator law, Haenchen looked forward to treatment stating, "I'm safe from people and they're safe from me."¹⁴

On July 1, 1999 Haenchen became the first sex offender civilly committed under Missouri's new Sexually Violent Predator Act.¹⁵ Unfortunately, Haenchen's history of sex offenses is not unique. In fact, over one million sex offenders are currently incarcerated in U.S. prisons.¹⁶ Missouri legislators cited such statistics to justify the enactment of the Act, which became effective on January 1, 1999.¹⁷

Missouri legislators enacted the Act with two main goals in mind. First, the Act attempts to protect the community from convicted sex offenders who have not been successfully rehabilitated in prison.¹⁸ Second, the Act provides inpatient treatment for convicted sex offenders in a state-run facility.¹⁹ It allows the state to institutionalize certain sex offenders following their prison sentence until they are able to demonstrate that they are no longer sexually violent predators (SVPs).²⁰ Although a large number of individuals are convicted of sex offenses each year, the Act targets only the most violent sex

Rulings, ST. LOUIS POST-DISPATCH, July 21, 1999, at A1.

11. *Id.*

12. Kim Bell, *State Will Try to Block Release of Convicted Child Molester; Prosecutors Say He is a "Sexually Violent Predator,"* ST. LOUIS POST-DISPATCH, Apr. 16, 1999, at B1.

13. *Id.*

14. Kim Bell, *Child Molester Opts for Indefinite Stay in Missouri Psychiatric Clinic; He's First Sexual Predator to do so Under New Law*, ST. LOUIS POST-DISPATCH, July 2, 1999, at A7.

15. *Id.*

16. Madelyn J. Daley, Comment, *Do Sexually Violent Predators Deserve Constitutional Protections? An Analysis in Light of the Supreme Court's Ruling in Kansas v. Hendrick*, 521 U.S. 346 (1997), 23 S. ILL. U. L.J. 715, 715-16 (1999).

17. *Questions, Answers About Sex Predators and Missouri's New Law Covering Them*, ST. LOUIS POST-DISPATCH, July 21, 1999, at A10 [hereinafter ST. LOUIS POST-DISPATCH].

18. *Id.*

19. *Id.*

20. *Id.*

offenders.²¹

This Recent Development examines the history and future implications of Missouri's Sexually Violent Predator Act.²² Section II describes the development of sexual psychopath laws and sexually violent predator statutes by highlighting their apparent strengths and weaknesses in light of various constitutional attacks. Section III details the provisions of Missouri's Act and then compares the Act with other states' sexually violent predator statutes. Finally, Section IV of this Recent Development considers whether the Act is designed to achieve its stated purpose and explores effective alternatives to the Act.

II. THE HISTORY OF SEXUAL PREDATOR LAWS

A. Sexual Psychopath Laws

Every state provides for indefinite civil confinement of mentally ill individuals who are deemed to be a threat to themselves or the safety of others. Mental illness and dangerousness have long been prerequisites for, and justifications of, civil commitment in the United States.²³ Courts rationalize this policy by emphasizing its benefit to the individual and the prevention of future crimes.²⁴

Until recently, however, most states employed strictly punitive measures to control the behavior of convicted sex offenders.²⁵ During the nineteenth century, states punished individuals convicted of raping women or children with death.²⁶ However, widespread support

21. *Id.*

22. MO. REV. STAT. §§ 632.480 – 513 (Supp. 1999).

23. *See* Addington v. Texas, 441 U.S. 418, 426 (1979) (stating that the state's burden of proof in a civil commitment hearing is clear and convincing evidence of both mental illness and dangerousness). *See also* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (noting that a finding of mental illness is critical to civil commitment); Jones v. United States, 463 U.S. 354, 370 (1983) (holding that states may order automatic civil commitment for individuals pleading not guilty by reason of insanity until that individual proves they are no longer mentally ill).

24. Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 160 (1996).

25. Jean Peters-Baker, *Challenging Traditional Notions of Managing Sex Offenders: Prognosis is Lifetime Management*, 66 UMKC L. REV. 629, 631 (1998).

26. *Id.* *See also* Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Federal Crime Bill*, 46 MERCER L.

for civil commitment of the mentally ill and the social desire to protect children and families encouraged states to begin promoting a medical model of criminal justice.²⁷

In the 1930s states began passing sexual psychopath statutes. These statutes allowed the commitment of mentally ill individuals who were repeat sex offenders.²⁸ The statutes employed civil commitment as an alternative to incarceration for individuals with psychopathic personalities.²⁹ In addition, these statutes represented the criminal justice system's attempt to incorporate a therapeutic approach to rehabilitating criminal disorders.³⁰

Sexual psychopath statutes were based on four presumptions: (1) sexual psychopaths are distinguishable from generic sex offenders; (2) individuals commit sexual offenses because of a mental disease; (3) mental diseases are treatable and curable; and (4) mental health professionals can successfully predict which sex offenders are likely to reoffend in the future.³¹ These statutes required the state to show that the sex offender met several criteria before the offender could qualify as a sexual psychopath. For instance, the state had to prove that the offender had an existing and identified mental disorder.³² In addition, the statutes required a judicial determination that the offender had a propensity to commit sexual acts.³³ Finally, the statutes mandated a finding that the individual was dangerous to others.³⁴

In the 1970s, however, several groups called for the repeal of sexual psychopath statutes.³⁵ The mental health community criticized

REV. 889, 896-97 (1995).

27. Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 N.W. U.L. REV. 1317, 1319 (1998) ("From the late nineteenth to the mid-twentieth centuries, efforts to promote and protect children and the family concentrated on potentially destructive trends and behaviors that could impede the societal goal of procreative marriage . . .").

28. Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, With Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 71 (1996).

29. *Id.*

30. Denno, *supra* note 27, at 1378-83.

31. Schulhofer, *supra* note 28, at 71-72.

32. *Id.*

33. *Id.*

34. *Id.*

35. Schulhofer, *supra* note 28, at 73.

these statutes for using a broad definition of the term “mental disorder.”³⁶ At the same time, a political movement supporting general deinstitutionalization emerged. The movement was based on the widespread belief that commitment under the sexual psychopath statutes did not successfully reduce sex offender recidivism.³⁷ As a result of this growing criticism, the statutes were used infrequently and, in some instances, repealed by state legislatures.³⁸

In 1986, however, the Supreme Court upheld the validity of the remaining sexual psychopath statutes in *Allen v. Illinois*.³⁹ Additionally, the court held that defendants in civil sexual psychopath proceedings were not entitled to the same protections afforded to defendants in criminal proceedings, such as the privilege against self-incrimination.⁴⁰

B. Sexually Violent Predator Statutes

A second generation of sexually violent predator statutes (hereinafter SVP statutes) reflects another attempt by state legislatures to address the distinct social problems posed by sex offenders.⁴¹ While these laws share many similarities with older sexual psychopath legislation, they possess one important difference. Instead of using institutionalization as an alternative to incarceration, SVP statutes use civil commitment in addition to incarceration.⁴²

36. *Id.* at 72-73 (explaining that the “broad definition of mental illness in sexual psychopath statutes allows almost any mental aberration or emotional disorder to qualify,” and that “more frequently than not, mental illness is deduced primarily, if not solely from the commission of the sexually deviant act . . .”).

37. *Id.* at 72.

38. *Id.*

39. 478 U.S. 364 (1986) (finding that the sexually dangerous persons statute was correctly classified as a civil rather than a criminal statute).

40. *Id.*

41. *Id.* at 72. *See also* Peters-Baker, *supra* note 25, at 655 (observing that several states use civil commitment statutes as a means of controlling recidivism among sex offenders).

42. Janus, *supra* note 24, at 159. *See also* John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 379 (1999). The SVP laws:

are designed to keep in confinement sex offenders considered at high risk of committing a sex crime who have served their criminal sentence and otherwise would have to be released from prison. Predator laws contemplate that these sex offenders will be confined in secure facilities until there is strong evidence that they no longer

Therefore, unlike the individuals committed under older sexual psychopath statutes, SVP statutes require that individuals be convicted of a sexually violent offense before they can be civilly committed.⁴³ Procedurally, after offenders serve their prison sentence, they are retried in civil proceedings to determine whether they may be classified as SVPs.⁴⁴ Despite the controversial nature of SVP statutes, numerous states have enacted these laws and hundreds of sex offenders have been civilly committed in just a few years.⁴⁵

Although the details of SVP statutes vary from state to state, their general provisions and purposes are similar. Civilly committing a sex offender as an SVP begins with a psychological evaluation.⁴⁶ Just before an individual with a history of committing sex offenses is released from prison, a psychiatrist or psychologist conducts an evaluation. This evaluation determines whether the individual suffers from a mental abnormality which makes them likely to reoffend once released from prison.⁴⁷ If the psychologist concludes that the sex offender has a mental abnormality and runs a high risk of reoffending, the department of corrections and the department of mental health refer the offender's file to the Attorney General.⁴⁸ The

pose a risk to the public.

Id. at 379.

43. Stuart Scheingold, *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGENT SOUND L. REV. 809 (1992).

44. *Id.*

45. The following states' statutes allow civil commitment of a convicted sex offender: ARIZ. REV. STAT. ANN. §§ 36-3701 to 3716 (West Supp. 1999); CAL. WELF. & INST. CODE §§ 6600-6609.3 (West Supp. 2000); FLA. STAT. ANN. § 775.21 (West Supp. 2000); ILL. COMP. STAT. 207/10-70. (Supp. 1999); KAN. STAT. ANN. §§ 59-29a01 – 29a20 (Supp. 1999); MINN. STAT. § 253B.01-.23 (West 1998 & Supp. 2000); MO. REV. STAT. §§ 632.480-513 (Supp. 1999); N.J. STAT. ANN. § 30:4-82.4 (West Supp. 2000); S.C. CODE ANN. §§ 44-48-10 to 44-48-170 (Law Co-op. Supp. 1999); WASH. REV. CODE ANN. §§ 71.09.010-.902 (West 1993 & Supp. 2000); WIS. STAT. ANN. §§ 980.01-.13 (West 1998 & Supp. 1999).

46. See Karl A. Menninger, *Proof of Qualification for Commitment as a Mentally Disordered Sex Offender*, 51 AM. JUR. PROOF OF FACTS § 9 (1999).

47. *Id.* §§ 3-4.

48. *Id.* See Andrew D. Campbell, Note, *Kansas v. Hendricks: Absent a Clear Meaning of Punishment, States Are Permitted To Violate Double Jeopardy Clause*, 30 LOY. U. CHI. L.J. 87, 111 (1998).

Civil commitments for sexually violent predators are initiated when an agency with proper jurisdiction provides ninety-day written notice to the Attorney General that someone who has been previously convicted of a "sexually violent" offense and may meet the criteria of a sexually violent predator is expected to be released from

Attorney General, in conjunction with the prosecutor for the county where the offense was committed, decides whether to petition the state to civilly commit the offender as an SVP.⁴⁹ If they decide not to petition the state, the offender is released from prison at the end of his sentence. If a petition is filed, however, the offender is detained until the state conducts a probable cause hearing, usually held within seventy-two hours of the filing of the petition.⁵⁰ If the judge finds probable cause, the offender awaits trial in the custody of the department of mental health in the state's sexually violent predator treatment program.⁵¹

Although SVP trials are civil hearings, defendants in these trials receive some of the protections afforded to criminal defendants.⁵² For example, the state's burden of proof in an SVP trial is proof beyond a reasonable doubt, the same standard the state must meet in a criminal trial.⁵³ However, the defendant is not provided with criminal protections like the Fifth Amendment privilege against self incrimination.⁵⁴

At trial, a jury must decide whether the defendant meets the statutory criteria required to label the individual a "sexually violent predator."⁵⁵ If the jury decides that the defendant does not meet the criteria, then the defendant is released.⁵⁶ However, if the jury decides that the defendant meets the criteria, then the defendant is indefinitely committed to a department of mental health facility for "control, care

confinement.

Id.

49. *Id.* The Attorney General will appoint a review committee to assess the data on the offender to determine whether the offender may be considered an SVP. *Id.* After determining that the offender qualifies as an SVP, the Attorney General may file a petition within seventy-five days. *Id.*

50. *Id.* See also Menninger, *supra* note 46, § 12 (explaining that "[o]nce the petition is filed, the judge determines whether there is probable cause to believe that the person meets the commitment criteria . . .").

51. La Fond, *supra* note 42, at 377.

52. Campbell, *supra* note 48, at 112 ("The trial provides the criminal law protections of a jury trial, free counsel for indigent defendant, and the right to call and cross-examine witnesses.").

53. *Id.*

54. Menninger, *supra* note 46, § 12.

55. Campbell, *supra* note 48, at 112.

56. ST. LOUIS POST-DISPATCH, *supra* note 17.

and treatment” until such a time that the defendant may safely return to the community.⁵⁷ During this commitment period, the state must provide the sex offender with treatment designed to facilitate rehabilitation.⁵⁸ Periodic reviews are available where offenders may attempt to demonstrate that they no longer qualify as sexually violent predators and request release.⁵⁹

The new SVP statutes blend criminal and civil procedure because they provide for civil proceedings; as a result, they do not afford sex offenders several key constitutional protections.⁶⁰ For example, SVP statutes are not subject to the prohibition against double jeopardy,⁶¹ nor do they violate the constitutional protection against ex post facto laws.⁶² Individuals committed under SVP statutes have challenged these laws as being void for vagueness⁶³ and for violating both the equal protection⁶⁴ and the due process clauses.⁶⁵

57. *Id.*

58. Menninger, *supra* note 46, § 13. “The SVP laws provide that a person can be released if it can be shown that his mental disorder has changed to the extent that it is safe to release him, as he will no longer engage in sexually violent acts.” *Id.*

59. Campbell, *supra* note 48, at 112. Committed persons are entitled to a yearly review of their mental condition. At the time, the court conducts a hearing to determine whether probable cause exists “to believe the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged.”

Id.

60. Daley, *supra* note 16, at 723-31. *See also In re Anders*, 710 N.E.2d 475, 479 (Ill. App. Ct. 1999) (explaining that “proceedings under the Act are civil, not criminal, in nature and do not implicate the respondent’s constitutional right to remain silent” and that the “right to remain silent . . . only applies during hearings conducted after the filing of petitions . . .”); *In re Tiney-Bey*, 707 N.E.2d 751, 754 (Ill. App. Ct. 1999) (stating that the “respondent’s constitutional right to remain silent is not implicated by the Commitment Act’s psychiatric evaluation requirement . . .”).

61. Daley, *supra* note 16, at 719. *See also Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (opining that initiation of the commitment proceedings does not constitute a second prosecution and that “commitment under the Act is not tantamount to ‘punishment . . .’”).

62. *Hendricks*, 521 U.S. at 369. The *Hendricks* Court also found that the Kansas statute could not be classified as penal. Therefore, the Court disposed of the defendant’s ex post facto argument on the grounds that the clause pertains “exclusively to penal statutes.” *Id.* at 370-71. The Court also noted that the Kansas Act “clearly does not have retroactive effect” because it is based upon an assessment of a respondent’s current mental status, not his mental status at the time of his actual conviction. *Id.* at 371.

63. *Id.* at 360 (rejecting the void for vagueness argument, holding that the term “mental abnormality” in the Kansas Sexual Predator Statute was not unduly broad nor subjective for purposes of due process).

64. *See State v. Post*, 541 N.W.2d 115, 129 (Wis. 1995) (stating that the Wisconsin

Despite these challenges, courts repeatedly uphold the constitutionality of SVP statutes. The Supreme Court upheld the constitutionality of the Kansas Sexual Predator statute⁶⁶ in *Kansas v. Hendricks*.⁶⁷ In its opinion, the Court found that the Kansas statute “requires proof of more than just a mere predisposition to violence.”⁶⁸ In fact, the Court found that the SVP statute “requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated.”⁶⁹ In addition, the Court upheld civil commitment laws generally because other states also required a finding of dangerousness and mental illness or incapacity.⁷⁰ Therefore, the Court likened the Kansas statute to general civil commitment statutes, which the Court repeatedly upheld.⁷¹

Following the Supreme Court’s approval of the Kansas SVP statute, several hundred men and at least two women have been committed under SVP statutes.⁷² Moreover, few individuals committed as sexually violent predators have been released from confinement.⁷³ Based on this trend, the number of individuals confined under these laws is likely to increase.

Sexually Violent Predator Act does not violate equal protection and that the Supreme Court has declined to articulate the appropriate level of scrutiny for involuntary commitment cases).

65. *Hendricks*, 521 U.S. at 360 (holding that the Kansas Sexual Predator statute did not violate substantive due process requirements).

66. KAN. STAT. ANN. §§ 59-29a01 to 29a20 (1994).

67. *Hendricks*, 521 U.S. 346.

68. *Id.* at 357.

69. *Id.*

70. *Id.*

71. Daley, *supra* note 16, at 727.

72. La Fond, *supra* note 42, at 380.

73. *Id.* An October 1998 survey estimated that:

423 individuals have been committed as SVPs to custodial facilities, 14 have been committed as SVPs to outpatient status, and 289 individuals have been committed as inpatients for evaluation or pending trial . . . Thus it appears that over 700 individuals are now in custodial facilities under SVP laws.

Id. at 380 n.36.

III. MISSOURI'S SEXUALLY VIOLENT PREDATOR'S ACT

A. Statutory Definitions

Missouri's Sexually Violent Predator's Act is similar to most states' SVP statutes.⁷⁴ It defines a sexually violent predator as a person with a mental abnormality that makes them likely to engage in sexually violent acts if not confined.⁷⁵ Mental abnormality, the critical element of the sexually violent predator definition, is statutorily defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."⁷⁶ The Act also specifically enumerates the sexually violent offenses that make an individual eligible for commitment.⁷⁷

B. Procedure

Based on these definitions, the Act sets out procedural rules for SVP cases. First, the Act provides that within 180 days of a previously-convicted sex offender's release from the department of corrections, the state shall provide written notice of the offender's name, offense history, documentation of institutional adjustments,

74. MO. REV. STAT. § 632.480-513 (Supp. 1999).

75. MO. REV. STAT. § 632.480.5. The Act defines a sexually violent predator as:

[A]ny person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who (a) [h]as plead guilty, or been found guilty, or been found not guilty by reason of mental disease or defect pursuant to section 552.030, RSMo, of a sexually violent offense; or (b) [h]as been committed as a criminal sexual psychopath pursuant to section 632.475, RSMo, and statutes in effect before August 13, 1980.

Id.

76. § 632.480(2).

77. § 632.480.4. Sexually violent offenses are defined as:

[T]he felonies of forcible rape, rape, statutory rape in the first degree, forcible sodomy, sodomy, statutory sodomy in the first degree, or an attempt to commit any of the preceding crimes, or child molestation in the first or second degree, sexual abuse, sexual assault, deviate sexual assault, or the act of abuse of a child . . . which involves sexual contact

Id.

and any treatment received or refused to the attorney general and a statutorily defined multidisciplinary team.⁷⁸ The team, which includes the director of the department of mental health and the director of the department of corrections, reviews the records of each referred individual and, within thirty days, provide an assessment of whether the person satisfies the statute's definition of an SVP.⁷⁹ When both the attorney general and the multidisciplinary team conclude that an individual qualifies as an SVP, the attorney general files a petition for civil commitment within forty-five days of the date on which the attorney general received its written notice.⁸⁰

After the petition is filed, the offender receives a probable cause hearing where a judge determines whether probable cause exists to classify the person as an SVP.⁸¹ If the judge finds probable cause, then the individual is taken immediately into custody and placed in an appropriate, secure facility.⁸² Within seventy-two hours of detainment, the individual has an opportunity to contest the probable cause finding.⁸³ If the court upholds its findings of probable cause, a psychiatrist or psychologist will conduct a mental health examination of the offender.⁸⁴ Then, within sixty days of the mental health evaluation, the court holds a trial to determine whether it should

78. § 632.483.1(1). The multidisciplinary team is designated by the director of the department of mental health and the director of the department of corrections. § 632.483.4. The team cannot consist of more than seven members, one of which must be from the department of corrections and one from the department of health. *Id.* In addition, the team may include representatives from various other state agencies. *Id.*

79. § 632.483.4. The statute requires the team to notify the attorney general of the results of its assessments. § 632.483.5. The attorney general also appoints a five-member prosecutor's review committee. *Id.* This committee makes their own determination of whether the individual satisfies the definition of a sexually violent predator. *Id.*

80. § 632.486.

81. § 632.489.

82. § 632.489.1.

83. § 632.489.2. At this hearing, the detainee has the right to counsel, the right to present evidence on his own behalf, the right to cross-examine witnesses, and the right to see a copy of all petitions filed by the state pertaining to the case. § 632.489.3(1)-(4).

84. § 632.489.4. Individuals may also choose to be examined by a psychiatrist or psychologist of their own selection at the individual's own expense. *Id.* Each psychiatrist or psychologist examining the individual will be given access to all the information provided to the multidisciplinary team and any records of the person's prior offenses. *Id.* The examining doctor is also authorized to interview family members, victims, and witnesses to the offenses. *Id.* This examination must take place within sixty days of its order. *Id.*

commit the individual as an SVP.⁸⁵ At trial, a jury determines whether the individual qualifies as an SVP.⁸⁶

Once a jury makes this determination, the offender is “committed to the custody of the director of the department of mental health for control, care and treatment until such time as the person’s mental abnormality has so changed that the person is safe to be at large.”⁸⁷ The department of corrections must separately confine SVPs from other mental health patients and from other offenders in the department’s custody.⁸⁸ Each SVP is entitled to an annual mental health review by the department of mental health and an annual court review of their case.⁸⁹ If, during the annual review, the court finds probable cause to believe that the SVP’s mental status has changed such that the SVP is no longer a threat to society at large, the court holds a hearing on the issue.⁹⁰ This hearing decides whether the SVP will be released from confinement or will be recommitted until safely returned to society.

C. Scope

The Missouri legislature broadened the scope of the original Act through recent amendments. The Act now applies to sex offenders who were previously released from prison, as well as those who are presently incarcerated. In May 1999 the Act was expanded to include two additional types of individuals: (1) those released from prison within the last ten years who meet the SVP criteria and (2) those individuals who, without committing an actual crime, do something sexual in nature to frighten someone else.⁹¹ These new provisions

85. § 632.492. At trial the individual is entitled to assistance by counsel and trial by jury if also requested. If the individual is indigent, the court appoints counsel. § 632.492.

86. § 632.495. The state’s burden of proof is proof beyond a reasonable doubt. In addition, the jury’s decision must be unanimous. *Id.*

87. *Id.*

88. *Id.* An SVP must be confined in a secure facility and “sh all be segregated at all times from any other patient under the supervision of the director of the department of mental health.” *Id.*

89. § 632.498.

90. § 632.501. The attorney general represents the state’s interests and must prove beyond a reasonable doubt that the SVP’s mental status remains unchanged. § 632.501.

91. Kim Bell, *New Commitment Bill is Untested by Courts; Measure Targets Predators After Their Release From Prison; Critic Says it’s Likely to be Rejected*, ST. LOUIS POST-

differ from anything found in other state SVP statutes and have not yet been adjudicated by the courts.⁹² These provisions allow the state to require an individual currently living in society who previously pleaded guilty to a sex offense or has a prior sex offense conviction to undergo an evaluation if he commits “a recent overt act.”⁹³ “A recent overt act” includes any act creating a “reasonable apprehension of harm of a sexually violent nature.”⁹⁴ Therefore, the Act now reaches the hundreds of sex offenders who have been returned to society and allows the state to “go after someone if law enforcement thinks they know of someone (on the street) who is a dangerous predator.”⁹⁵

D. Purpose of and Rationale for the Act

The Act’s proponents assert that its purpose is both to protect the public at large from the continuing threat posed by SVPs and to treat SVPs who will someday return to society.⁹⁶ Furthermore, proponents note that commitment under the Act requires more than just the state’s desire to prevent sex offender recidivism. The state must also demonstrate that the offender has a mental disorder causally related to his dangerous conduct.⁹⁷ Therefore, the Act is predicated upon the notion of treatment rather than punishment.⁹⁸

Proponents cite the high rate of recidivism among sex offenders as

DISPATCH, May 16, 1999, at A1.

92. *Id.*

93. *Id.*

94. *Id.* The law provides nine days for the department of mental health to evaluate the person.

95. *Id.* According to statistics provided by the Missouri Department of Corrections:

[O]ne hundred sixty-four sexual offenders were released from prison before 1995, and remain under the supervision of the state parole board. About 180 have been released since 1995 and are under state supervision. Nearly 700 sexual offenders were released from prison before 1995 and are no longer under any form of supervision.

Id.

96. ST. LOUIS POST-DISPATCH, *supra* note 17.

97. *Id.* See also Schulhofer, *supra* note 28, at 77 (noting that SVP statutes require more than just a demonstration of an antisocial personality; the state must demonstrate the existence of a personality disorder).

98. ST. LOUIS POST-DISPATCH, *supra* note 17.

another rationale for the Act.⁹⁹ They argue that sex offenders present a high risk both to themselves and to society at large. Proponents assert that the Act was designed to enable individuals with a mental disorder to make a successful transition back into society by providing them with necessary treatment.¹⁰⁰ The Act also provides an incentive for convicted sex offenders to utilize the available treatments while they are incarcerated in order to avoid civil commitment upon release.¹⁰¹ In addition, many proponents of the Act believe that sex offenders are readily distinguishable from other offenders. They argue that experts can predict sexual recidivism and identify those sex offenders who can safely be returned to the community. Furthermore, proponents say that the Act only targets the most serious sex offenders, those offenders who pose the greatest threat to society.¹⁰² Consequently, they argue that the Act is limited in scope and that the state does not intend to apply it broadly to all sex offenders.¹⁰³

The perceived ineffectiveness of the treatment that sex offenders receive in prison also supports the Act's rationale.¹⁰⁴ Many sex offenders are unwilling to undergo any treatment while they are incarcerated¹⁰⁵ and never participate in the treatment programs available to them during their incarceration. As a result, sex offenders commonly complete their sentences without receiving any treatment at all.

State officials also defend the Act by citing current and projected statistics of the Act's impact on sex offenders. Currently, Missouri prisons hold 3,379 sex offenders.¹⁰⁶ However, because the Act is

99. Scheingold, *supra* note 43, at 812 (citing statistics that 48% of all sex offenders were rearrested after release and 51.5% of all rapists were rearrested after release).

100. ST. LOUIS POST-DISPATCH, *supra* note 17.

101. Kevin Murphy, 'Stephanie's Law' Signed by Governor in Missouri; 'Sexually Violent Predators' are Focus of Safety Legislation, KAN. CITY STAR, July 3, 1998, at A1.

102. Stephen Chapman, *Sexual Predators Should be Confined*, ST. LOUIS POST-DISPATCH, June 27, 1997, at 7B.

103. Kansas, for example, only committed nine of the 805 sex offenders who completed their sentences in 1997. *Id.*

104. Bell, *supra* note 14. Kevin Haenchen, the first man to be committed under the Act, felt that the state denied him adequate mental health care during his prison sentence. *Id.*

105. *Id.* Department of corrections officials said that Haenchen refused to participate in sex offender treatment while in prison. *Id.*

106. ST. LOUIS POST-DISPATCH, *supra* note 17.

designed to target only those offenders deemed to also have a mental abnormality, the state has committed only one individual under the Act¹⁰⁷ and ten more are awaiting trial.¹⁰⁸ State officials estimate that under the current plan forty-five offenders will be committed as SVPs each year.¹⁰⁹ The Department of Mental Health estimates that 150 SVPs will be committed to the state's new sex offender treatment facility by 2002.¹¹⁰

IV. MENTAL HEALTH TREATMENT OR PROSPECTIVE INCARCERATION?

The Act's purpose and rationale stimulates much controversy. Proponents claim that the Act is designed to facilitate mental health treatment for sex offenders. In contrast, opponents contend that the Act is actually a form of prospective incarceration that represents an unconstitutional abuse of power.

A. Proponents: The Act Provides Mental Health Treatment to Sex Offenders

One of the primary arguments in favor of the Act is that it effectively protects the public from sex offenders prone to recidivism.¹¹¹ The Act's proponents link offender recidivism to the lack of treatment available to, and utilized by, sex offenders while they are incarcerated. In addition, the poor prognosis for curing sex offenders and the long-term treatment needs of sex offenders further justify proponents' arguments in favor of the Act.¹¹² Therefore, the

107. Bell, *supra* note 10.

108. *Id.*

109. ST. LOUIS POST-DISPATCH, *supra* note 17.

110. *Id.*

111. Scheingold, *supra* note 43, at 812.

112. Schulhofer, *supra* note 28, at 74-75. SVP statutes reflect:

the legislature's perception that sexually violent offenders pose distinct problems that cannot be addressed through the state's ordinary regime for civil commitment. The legislative findings. . . [indicate] that SVPs, unlike the ordinary subjects of civil commitment, do not have a "mental disease or defect that renders them appropriate for the existing involuntary treatment act. . . ." [T]he treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the

Act attempts to help provide long-term care and treatment specifically tailored to the needs of those sex offenders who do not receive treatment while they are incarcerated. In turn, this treatment helps sex offenders successfully reintegrate themselves into society. The Act requires that sex offenders be committed to mental institutions rather than incarcerated in prison during their civil commitment. Proponents argue that the Act is not significantly different from other involuntary commitment statutes.

Furthermore, the Act is intended only to affect a small percentage of incarcerated sex offenders. Its goal is to reach those offenders with a high chance of recidivism and those who have committed the most heinous sex offenses. This eligibility restriction for commitment under the Act is consistent with a rehabilitative objective. Whereas penal statutes are targeted at a broad population, only a small portion of the public, those sex offenders with serious untreated mental disorders, fall within the scope of the Act.

B. Opponents: The Act Legitimizes Incarceration Without Crime

Not suprisingly, the Act's critics maintain that rehabilitation is not its primary goal. Instead, they assert that the Act is punitive in nature because it creates a form of prospective incarceration.¹¹³ Critics argue that the Act attempts to confine previously-convicted sex offenders for crimes the state suspects they will commit in the future. In addition, opponents worry about the precedent that the Act and its counterparts in other states will set. *Kansas v. Hendricks* left open the possibility that other states will enact laws which, despite their noble purpose, severely abridge the constitutional rights of unpopular

involuntary treatment act.

Id.

113. Campbell, *supra* note 48, at 124. Campbell notes that in *Kansas v. Hendricks* the majority failed to recognize that:

[The Kansas statute,] considered in its entirety, is clearly punitive in nature. In concluding that Kansas's regime of committing "sexually violent predators" for "very long" terms does not constitute punishment, the majority misinterprets the "clearest proof" standard which has been applied in previous cases and also ignores fundamental notions of what constitutes the core of punishment, namely moral blame.

Id.

groups.¹¹⁴

Another criticism of the Act is that it represents an abuse of the involuntary civil commitment statute. Many sex offenders who will be confined under the Act have personality disorders which are not diagnosable, treatable mental illnesses.¹¹⁵ Consequently, indefinite commitment may not solve the sex offender's mental health problems. In addition, critics note that sex offenders are a diverse group and often commit multiple types of crime.¹¹⁶ This complicates the ability of researchers and clinicians to accurately predict the likelihood that an individual will reoffend¹¹⁷ and raises further questions about the success of programs used to treat sex offenders under the Act.¹¹⁸

Moreover, the methods used to treat sex offenders are inconsistent with the methods used in other involuntary commitment cases because they may not actually facilitate the treatment of the sex offender. As a result, the Act could be used indiscriminately and applied beyond the limited scope of the statute. Furthermore, critics view the Act as an abuse of state mental health systems. The mental health system has a distinct and valuable purpose independent of the state correctional system. The state should not use the system as a dumping ground for those criminal offenders who serve their time in prison but are still considered dangerous to society.

Finally, the recent amendments to the Act compound the potential for abuse. Legislation that authorizes the civil confinement of individuals who have not been convicted of any crimes since their release from prison sets a dangerous precedent.

114. Michelle Johnson, *The Supreme Court, Public Opinion, and the Sentencing of Sexual Predators*, 8 S. CAL. INTERDISC. L.J. 39, 83 (1998) ("Given this precedent, states could conceivably enact other 'civil' statutes to keep other repeat offenders—or even first-time offenders who are considered dangerous and mentally unbalanced—in prison.").

115. Charles Krauthammer, *Don't Incarcerate Without Crime*, ST. LOUIS POST-DISPATCH, Dec. 15, 1996, at 3B.

116. Scheingold, *supra* note 43, at 813 ("Sex offenders are often involved in other types of crimes, including violent, as well as nonviolent, nonsex crimes.").

117. *Id.* "Given the variations among sexual offenders and the lack of explanations to account for their behaviors, prediction would seem to be a rather chancy enterprise." *Id.*

118. *Id.* "According to a review . . . of forty-two treatment studies, clinical treatment has not been demonstrated to reduce recidivism rates for sex offender populations." *Id.*

C. Additional Problems With Indefinite Civil Commitment

This type of civil commitment and related treatment plans come with a high price. State officials expect the Act to cost a minimum of \$40,000 per offender, per year.¹¹⁹ These costs will burden an already financially-stressed public mental health system.¹²⁰ The cost of civil confinement is three times the cost of what the state currently spends to keep sex offenders incarcerated.¹²¹ In addition, the county which convicts the sex offender is responsible for the cost of civil commitment after release from prison. This could present serious long-term financial problems for small rural counties. The state also may find it difficult to develop sufficient resources to successfully implement Act for the long term. For example, the state currently houses sex offenders in a twenty-five bed wing of a medium security correctional facility.¹²² However, this facility is likely to fill up quickly, forcing the state to construct an additional facility to house the growing number of sex offenders committed under the Act.¹²³ Thus, the Act's economic demands require the development of more financially viable alternatives for the future.

D. Alternatives to Indefinite Civil Commitment

States should develop alternative treatment plans to address these concerns. First, states should implement individualized treatment plans as soon as a sex offender's prison sentence begins. States could base these treatment schedules on information compiled from lie-detector tests and penile plethysmograph tests, a test which measures sexual arousal.¹²⁴ Doctors and therapists could utilize this information to develop individualized treatment to best accommodate the specific needs of each sex offender. Other techniques, like group therapy and individual counseling, could establish a well-rounded rehabilitation

119. Bell, *supra* note 10.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Bell, *supra* note 10.

program.¹²⁵

Plans to address cost inefficiencies in the current penal system may also provide successful alternatives. Additional research that pinpoints which sex offenders are amenable to treatment will help the state determine those offenders best suited for incarceration and those best suited for treatment. In addition, linking an inmate's progression in treatment to prison release may encourage sex offenders to participate in the treatment programs provided in prison. Furthermore, increasing prison sentences for sex offenses and re-examining prison sex offender treatment programs are also necessary to facilitate rehabilitation while the offender is still incarcerated. Finally, identifying juvenile offenders who are at high risk for committing sex offenses may combat some of the problems with the current system. Most offenders exhibit long histories of sexually violent behavior, some dating from childhood. Therefore, identifying these individuals earlier in life can assist states' efforts in preventing future crimes.

IV. CONCLUSION

At first blush, the goal of the Missouri Sexually Violent Predator Law appears to be rehabilitation. Legislators applaud the effort to treat mentally-disturbed sex offenders and facilitate their reintegration in to society. However, upon closer review, it appears that rehabilitation under Missouri's SVP law comes with a significant price.¹²⁶ While rehabilitation is an admirable goal, more effective means of achieving rehabilitation exist. Missouri's SVP law represents an example of legislatures needlessly restricting individual constitutional rights in order to implement larger policy objectives and establishing a dangerous precedent for future legislation.

125. The director of the state's sexually violent predator treatment program believes that with proper treatment, offenders who take their rehabilitation seriously may be released someday. *Id.*

126. Scheingold, *supra* note 43, at 810. "[S]exual predator provisions lead in an incapacitative direction – that is, they are designed to predict which offenders are so dangerous that they must be more or less permanently institutionalized to protect the society." *Id.*